Supreme Court, U.S.
FILED
JUL 18 2001
CLERK

No. 00-1886

In The

Supreme Court of the United States

MICHAEL E. BISHOP, DR.,

Petitioner,

v.

BAYLOR UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether an officer of Baylor University who represented Baylor University during informal settlement negotiations of an employee's sex discrimination complaint engaged in protected activity under Title VII for opposing sex discrimination?

DISCLOSURE PURSUANT TO RULE 29.6

The Petition for Writ of Certiorari accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

On April 10, 1998, Michael Bishop ("Petitioner") filed his Original Complaint in which he presented numerous claims regarding age discrimination, retaliation for opposing religious discrimination, and retaliation for opposing sex discrimination. On August 12, 1998, Baylor University ("Baylor") filed its Original Answer and First Motion for Summary Judgment, which sought dismissal of Petitioner's lawsuit based on his failure to file within 90 days of receiving the EEOC's dismissal notice. The District Court denied Defendant's Motion for Summary Judgment on the grounds that the 90-day limitation period should be tolled.

On April 9, 1999, Baylor filed its Second Motion for Summary Judgment on all of Petitioner's claims. With regard to Petitioner's retaliation claims for opposing sex discrimination, Baylor moved for summary judgment on three separate grounds: (i) Petitioner's failure to show he had opposed sex discrimination as pleaded in Petitioner's Original Complaint; (ii) Petitioner's failure to establish a causal connection between alleged protected activity and an adverse employment action; and (iii) Petitioner's failure to show Baylor's legitimate, non-retaliatory reasons for his removal as Vice President were pretext for unlawful retaliation.

On April 4, 2000, the District Court granted summary judgment on all claims. With regard to retaliation for opposing sex discrimination, the District Court granted summary judgment on two separate grounds: (i) Petitioner's failure to establish he had opposed sex discrimination; and (ii) Petitioner's failure to establish a causal

connection between any alleged protected activity and an adverse employment action. Because Petitioner could not establish a *prima facie* case, the District Court did not consider whether Petitioner had sufficient evidence to establish Baylor's legitimate reasons for removal were pretext for unlawful retaliation.

On appeal to the Fifth Circuit, Petitioner sought reversal of the entire summary judgment order. In support of the judgment, Baylor asserted the matters raised in both the first and second motions for summary judgment. On March 13, 2001, the Fifth Circuit affirmed the entire judgment, adopting the trial court's reasoning.

On June 11, 2001, Petitioner filed a Petition for Writ of Certiorari, which concedes summary judgment on all claims, except retaliation for opposing sex discrimination with regard to Petitioner's removal as Vice President. However, Petitioner focuses only on one of the two grounds upon which summary judgment was granted and affirmed. Specifically, Petitioner's "Questions Presented" seeks review regarding whether Petitioner engaged in protected activity, and does not dispute that the correct legal standards were applied when determining Petitioner failed to establish a causal connection between Petitioner's removal as Vice President and alleged protected activity. Instead, Petitioner invites this Court to review the voluminous summary judgment record in the hope that this Court will disagree with the District Court's and the Fifth Circuit's determination that Petitioner failed to present sufficient evidence to establish a causal connection, and thus failed to establish a *prima facie* case of retaliation.

STATEMENT OF MATERIAL FACTS

Petitioner's "Statement of Material Facts" almost exclusively concerns his relationship with Herbert Reynolds, former Baylor University President, and contains almost no discussion of Petitioner's relationship with Robert Sloan, current Baylor University President. Yet, President Sloan, not President Reynolds, made the decision to remove Petitioner as Vice President. Plaintiff simply ignores this undisputed fact and speculates that President Reynolds somehow orchestrated Petitioner's removal as Vice President.

Below are the actual material facts without the speculation and hyperbole that permeate Petitioner's pleading:

Removal as Vice President

I. In March 1990, the President of Baylor University, Herbert Reynolds, hired Petitioner for the position of Chief of Staff for Baylor University. (5 R, Pl. Dep. at V. II, p. 191, lines 10-20 & Exh. 42)[1] Shortly after being hired as Chief of Staff, Petitioner was made a Vice President of

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[1] "R" refers to the record on appeal. Citations to the record are to the volume of the record on appeal followed by the page number in that volume (thus, 2 R 400 refers to Volume 2, Page 400 of the record). Volume 5 of the record refers solely to Baylor's Second Motion for Summary Judgment, which was not individually numbered. Accordingly, cites to 5 R do not list a page number, but are followed by a page or evidentiary cite to the Motion or the attached summary judgment evidence.

Baylor University ultimately in charge of the Office of Communications and Marketing. (5 R, Pl. Dep. at V. II, p. 198, line 13 to p. 199, line 8)

2. In February 1995, the Board of Regents selected Dr. Robert Sloan to succeed President Reynolds as Baylor's next President. (5 R, Reynolds Aff. at ¶ 19) During the transition period, Dr. Sloan requested that President Reynolds review all members of his staff with him. (5 R, Reynolds Aff. at ¶ 19; *see also* 5 R, Sloan Aff. at ¶¶ 8-9) Although President Reynolds shared his general thoughts about Petitioner and others, he made no disqualifying comments about any individual. (*Id.*) President Reynolds did mention to Dr. Sloan that he had previously considered moving Petitioner's area of responsibility under University Relations, but President Reynolds did not recommend that Dr. Sloan make that change. (5 R, Reynolds Aff. at ¶ 19)

3. President Reynolds did not recommend to President Sloan that anyone be terminated. (5 R, Reynolds Aff. at ¶ 20) President Sloan made no agreement with President Reynolds to remove or replace Petitioner. (5 R, Sloan Aff. at ¶ 9; 5 R, Reynolds Aff. at ¶¶ 19-20)

4. President Sloan's initial experience with Petitioner's work pre-dated his presidency. Dr. Sloan became the Dean of Baylor University's George W. Truett Theological Seminary in 1993. (5 R, Sloan Aff. at ¶ 3) In the fall of 1993, Baylor began to publicize the opening of the seminary in anticipation of the beginning of classes in the fall of 1994. (5 R, Sloan Aff. at ¶ 4) Dr. Sloan felt it was "like pulling teeth" to get Petitioner to have ads placed to

publicize the opening of the seminary. (*Id.*) On the opening day of classes at the new seminary, President Sloan could not get adequate coverage, and Petitioner assigned someone on his staff to attend rather than becoming involved himself. (*Id.*) During this process, President Sloan had great difficulty getting ads, a logo, a focus group to talk about a logo, or a photographer to take pictures of the first classes. (*Id.*) President Sloan found these experiences to be extremely frustrating and sapped any confidence he might otherwise have had in Petitioner's abilities. (*Id.*)

5. During the transition period, President Sloan intended that Petitioner would be removed as Vice President of Communications and Marketing through an administrative reorganization that would place Communications under University Relations. (5 R, Sloan Aff. at ¶ 5) President Sloan believed that Petitioner learned of these plans and went to members of the Board's Communications Committee seeking to have them intervene on his behalf. (*Id.*) The Chair of the Board's Communications Committee urged President Sloan to give Petitioner another chance. (*Id.*) President Sloan agreed to this request and the reorganization was not announced at that time as contemplated. (*Id.*)

6. President Sloan worked with Petitioner in the course of a "media blitz" in the summer of 1995 to acquaint alumni and other groups with Baylor's new president. (5 R, Sloan Aff. at ¶ 6) President Sloan believed the campaign went acceptably although he was not left with a particularly strong, favorable impression of Petitioner. (*Id.*) Indeed, President Sloan was struck by the fact that Petitioner was not good at public speaking, which he

perceived as a surprising shortcoming for someone serving as Vice President of Communications and Marketing. (*Id.*) President Sloan also concluded that Petitioner was planting rumors with the media about administration changes. President Sloan thus decided to move forward with his plans to shift Petitioner's area of responsibility under University Relations. (*Id.*)

7. At the conclusion of the "media blitz," President Sloan told Petitioner that he intended to make a change and gave Petitioner several alternatives to his current position. (5 R, Sloan Aff. at ¶ 7) These included remaining at Baylor as a tenured professor or, if he desired to leave Baylor and move on to a vice president-type position elsewhere, the opportunity to keep his salary and title for a certain period of time until he made that transition. (*Id.*) President Sloan informed Petitioner that the reason for the decision was that he was trying to build his own administration team. (*Id.*) President Sloan perceived Petitioner again attempted to lobby members of the Board of Regents to intercede on Petitioner's behalf, but the Board concurred with President Sloan's decision. (*Id.*) Petitioner ultimately decided that he wanted to stay at Baylor and serve as Chair of the Journalism Department. (5 R, Pl. Dep. at V. II, pp. 94-95)

8. Petitioner ceased to serve as a vice-president effective August 31, 1995. (5 R, Sloan Aff. at ¶ 7) Petitioner was only one of many persons affected by President Sloan's changes to Baylor's top administration. (5 R, Sloan Aff. at ¶ 10) Indeed, Dr. Donald Schmeltekopf was the only one of President Reynold's vice presidents who remained a vice president under President Sloan. President Sloan informed all others of his intent to make a

change in their position, and each retired, resigned voluntarily or, like Petitioner, was removed involuntarily.[2] (*Id.*)

Petitioner's Alleged Protected Activity

9. Petitioner claims that in early 1992 (while Petitioner was a vice president), Dr. Doug Ferdon, a Journalism professor, told him that the Journalism Department was divided and certain members of the department were harassing Sara Stone, another Journalism professor. (5 R, Pl. Dep. at V. I, p. 150) Shortly thereafter, Dr. Stone allegedly told Petitioner that she was being unfairly treated in an effort to force her out of the Journalism program. (5 R, Pl. Dep. at V. I, pp. 151-53)

10. In the early spring of 1992, Petitioner claims he told President Reynolds that the Journalism faculty was divided over the Department Chair's (Dr. Gould's) administrative practices and policies. (5 R, Pl. Dep. at V. I, p. 166) Because Drs. Stone and Ferdon approached Petitioner on a confidential basis, Petitioner did not identify their names or even mention their gender during the meeting with President Reynolds. (5 R, Pl. Dep. at V. I, pp. 164-65) The next conversation Petitioner and President Reynolds had on this matter was when President Reynolds telephoned Petitioner to say Dr. Gould had resigned, and President Reynolds was appointing Petitioner as the acting Chair of the Journalism Department.

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[2] President Sloan did not ask the Vice President of Student Life to resign; he voluntarily returned to the faculty. (5 R, Sloan Aff. at ¶ 10)

(5 R, Pl. Dep. at V. I, pp. 173-74) This occurred in or about December 1992. (5 R, Pl. Dep. at V. I, pp. 173-74)

11. The resignation of Dr. Gould as Chair did not resolve the discord in the Journalism Department. In the spring of 1994, Petitioner met with President Reynolds, Basil H. Thomson, Jr. (General Counsel), and others to discuss the continuing division within the department. (5 R, Pl. Dep. at V. I, pp. 174-76) At that meeting, Petitioner does not recall specifically identifying any issues regarding Dr. Stone, but recalls stating that division within the Journalism Department could be resolved by making faculty changes (*i.e.*, seeking the retirement of Baylor's four senior Journalism professors). (5 R, Pl. Dep. at V. I, p. 178)

12. During the same general time period, after discussions with Baylor's General Counsel, Petitioner agreed to meet with Dr. Stone as the Baylor administration representative in an effort to resolve Dr. Stone's complaints. (5 R, Pl. Dep. at V. I, pp. 187, 195 & V. II, pp. 30-32) Throughout these settlement discussions, Petitioner offered Baylor advice regarding settlement strategy and suggested possible settlement offers. (*See, e.g.*, 5 R, Reynolds Aff. at ¶¶ 13-16 & Exh. J)

13. Petitioner's final involvement was to send President Reynolds a memo which discussed settlement prospects in the Stone matter. (5 R, Pl. Dep. at V. I, p. 216 & Exh. 10) Afterwards, Petitioner does not recall any criticism regarding his role in the Stone matter, and he never discussed the matter with President Sloan. (5 R, Pl. Dep. at V. I, pp. 216, 221)

14. President Reynolds did not perceive that Petitioner was advocating Dr. Stone's side in any controversy

with Baylor or anyone else. (5 R, Reynolds Aff. at ¶ 13) Rather, President Reynolds assumed Petitioner was attempting to fulfill his responsibilities as a member of his cabinet. (5 R, Reynolds Aff. at ¶ 13) Indeed, during the Stone matter, Petitioner sent President Reynolds a letter that states Petitioner wanted his involvement in Dr. Stone's complaint to be "in whatever manner is most beneficial to the University." (5 R, Reynolds Aff. at ¶ 14 & Exh. J) President Reynolds was left with the obvious impression that Petitioner had been and intended to continue to advocate *Baylor's* position and interests with regard to Dr. Stone's complaint. (*Id.*)

15. There was no evidence in the summary judgment record that President Sloan was aware of the nature of Petitioner's activities with regard to the Stone matter.

REASONS FOR DENYING WRIT

1. Petitioner Has Waived His Right to Raise the Participation Clause.

Title VII recognizes two distinct categories of protected activity: (i) opposition to unlawful discrimination under Title VII; and (ii) participation in an investigation, proceeding or hearing under Title VII. *See* 42 U.S.C. § 2000e-3. Petitioner's Original Complaint focuses exclusively on alleged "opposition" to sex discrimination, and does not contain any allegations of retaliation based on participation in a statutorily protected activity. Specifically, Paragraph 54 of Petitioner's Original Complaint provides in pertinent part:

> Baylor's actions in terminating Bishop's employment . . . have violated the anti-retaliation provisions of 42 U.S.C. § 2000e, *et seq.* (Title VII), in that Bishop has *opposed* Baylor's unlawful discriminatory practices . . . and has spoken out in *opposition* to such practices and in support of those who have *opposed* such practices. . . . (emphasis added).

Petitioner's summary judgment response likewise focused exclusively on the "opposition" allegations pleaded in the Original Complaint. Indeed, the applicable heading of Petitioner's summary judgment response stated as follows: "PLAINTIFF CAN ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION FOR OPPOSING GENDER-BASED DISCRIMINATION." Petitioner did not raise a participation clause argument until appeal to the Fifth Circuit. However, it is well-settled that issues raised for the first time on appeal will not be considered. *Dean v. Dean*, 837 F.2d 1267, 1268 (5th Cir. 1988) (citing cases); *United States v. Bigler*, 817 F.2d 1139, 1140 n.3 (5th Cir.) (on rehearing), *cert. denied*, 484 U.S. 842 (1987). Having failed to timely raise his participation clause argument in the courts below, Petitioner may not now assert it in this Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990).

2. Petitioner Does Not Demonstrate a Split in Circuit Court Opinions on Any Material Issue in This Case.

Even if Petitioner had preserved the issue for review, it would be a waste of judicial resources to grant certiorari under the facts of the present case. Petitioner's Petition discusses at length a split in the circuit courts

concerning whether filing an EEOC charge is a prerequisite to protection under the participation clause. However, that legal question has no relevance here. It is undisputed that Journalism Professor Sara Stone filed an EEOC charge in the present case, and Petitioner represented Baylor during informal settlement negotiations after the charge was filed.[3] Petitioner's discussion of the circuit courts' differing views on the necessity of filing an EEOC charge under the participation clause is merely an attempt to mislead this Court into believing broad matters of legal importance attach to the present case.

Unable to show that he participated in "an investigation, proceeding or hearing under [Title VII]," Petitioner also claims his status as a faculty colleague, supervisor, University spokesperson, mediator, or potential witness equates to protected activity under Title VII. (Petition at 14) Yet, there is not a single case anywhere that equates an employee's status with protected activity. The relevant inquiry is what one has done, not who one is. At most, Petitioner acted as *Baylor's* representative during informal settlement discussions with Dr. Stone. There is no legal authority anywhere that would hold such discussions constitute an "investigation, proceeding or hearing under [Title VII]," and thus they cannot support a finding of protected activity under the participation clause. Accordingly, Petitioner's participation clause argument is

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[3] Petitioner does not seriously dispute the fact that his actions were not in opposition to alleged unlawful discrimination by Baylor. Indeed, Petitioner concedes he sent Baylor President Herbert Reynolds a letter that requested Petitioner's involvement in the Stone matter be "in whatever manner is most beneficial to the University."

not relevant, and the Court should deny Petitioner's Petition for Writ of Certiorari.

3. It Would Be Improvident to Grant the Petition Because Petitioner Has Otherwise Failed to Demonstrate Any Factual Basis for His Claim.

a. Failure to Establish Causal Connection.

Even assuming the existence of protected activity, it would be improvident to grant the Petition because Petitioner cannot provide sufficient evidence to establish a causal connection between any alleged protected activity and his removal as Vice President. Petitioner's alleged protected activity with regard to the Stone matter occurred between 1992 to 1994 while Herbert Reynolds was Baylor's President. Upon President Reynolds' retirement, Robert Sloan was named the new President of Baylor University, and President Sloan decided to remove Petitioner as Vice President during the transition to the new administration. Petitioner offered absolutely no admissible evidence that President Sloan ever knew of the alleged opposition or that connected President Sloan's removal decision with Petitioner's actions during the Reynolds administration. Moreover, President Reynolds unequivocally testified that he did not request that President Sloan remove Petitioner as Vice President, and President Sloan unequivocally testified that his decision to remove Petitioner as Vice President was not influenced by President Reynolds. The District Court and Fifth Circuit properly concluded that there was insufficient evidence to establish a causal connection between President

Sloan's removal decision and Petitioner's actions with regard to the Stone matter.

b. Failure to Establish Pretext.

Even assuming Petitioner could establish a *prima facie* case of retaliation by showing protected activity and the requisite causal connection, summary judgment remains appropriate based on Petitioner's failure to present evidence sufficient to show Baylor's legitimate reasons for his removal as Vice President were pretext for unlawful retaliation. *See Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000) (the plaintiff must offer sufficient evidence that defendant's proffered explanation is pretext for discrimination.); *Rios v. Rossotti*, 252 F.3d 375, 382 (5th Cir. 2001) (summary judgment affirmed where plaintiff failed to present evidence of pretext for discrimination or retaliation). As set forth in the Statement of Facts, with one exception, every single top administrator from President Reynolds' administration was replaced during the transition to President Sloan's administration. President Sloan also testified to his misgivings about Petitioner's performance as Vice President.

Petitioner offered no admissible evidence to refute Baylor's legitimate, non-retaliatory reasons for his removal as Vice President. Moreover, Petitioner did not even attempt to show that he was treated less favorably than a similarly-situated employee during the transition between administrations. Accordingly, it would be improvident to grant Petitioner's Petition for Review of

Certiorari in light of the fact that the ultimate outcome would remain unchanged.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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